

79938-5

No. 229301-111

**COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION III**

---

**In Re the Matter of Angelo Flores-Cork**

**HOLLY MARIE CORK**

**Appellant**

**v.**

**DAVID NAGEL & ANITA BANGERT**

**Respondents**

---

**APPELLANT'S SUPPLEMENTAL BRIEF**

---

**ANDREA POPLAWSKI**  
**Attorney for Appellant**  
**35 W. Main, Suite 300**  
**Spokane, WA 99201**  
**(509) 835-5211**

## TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES .....	1
II.	SUMMARY OF ARGUMENT .....	2
	1. Respondents Failed to Provide Any Evidence to Support Actual Detriment to the Child if Placed in the Biological Mother's Care. ....	3
	2. The Trial Court Erroneously Applied the "Best Interests of the Child" Standard Instead of the Actual Detriment Standard. ....	7
	3. The Trial Court Erroneously Transferred the Burden from the Respondents to the Biological Mother to Provide Evidence Why She Should Have Custody of her Child. ....	12
	4. Factors in <u>In Re Parentage of L.B.</u> Were Not Met, Therefore the Court Cannot Rely on Evidence of Psychological Parent. ....	16
III.	CONCLUSION .....	18

## TABLE OF AUTHORITIES

### Cases

<u>In re Custody of Nunn</u> , 103 Wash.App. 871, 14 P.3d 175, (2000)	5
<u>In re Custody of RRB</u> , 108 Wash.App. 602, 31 P.3d 1212, Wash.App.Div.2 (2001)	2
<u>In re Custody of Shields</u> , 136 P.3d 117 (Wash. Jun 08, 2006) (No. 75263-0)	2, 3, 4, 8, 9, 11, 12, 16
<u>In re Custody of Shields</u> 120 Wash.App. 108, 123, 84 P.3d 905 (2004)	4
<u>In re Custody of Stell</u> , 56 Wash.App. 356, 783 P.2d 615, Wash.App. (1989)	4
<u>In re Marriage of Allen</u> , 28 Wash.App. 637, 626 P.2d 16, Wash.App. (1981)	2, 3, 7, 11, 16
<u>In re Parentage of C.A.M.A.</u> , 154 Wash.2d 52, 60-61, 109 P.3d 405, Wash. (2005)	3, 6
<u>In re Parentage of L.B.</u> , 121 Wash.App. 460, 89 P.3d 271 (2004)	7, 16, 17, 18
<u>V.C. v. M.J.B.</u> , 163 N.J. 200, 748 A.2d 539 (2000)	17

### Statutes

RCW 26.09.187	9
RCW 26.09.0187	11
RCW 26.09.100	9
RCW 26.09.187	8, 10
RCW 26.10	18
RCW 26.10.030(1)	2
RCW 26.10.030(12)	12

## **FINDINGS OF FACT and CONCLUSIONS OF LAW**

<u>FFCL 2 CP at 460</u> .....	9
<u>FCCL 3 CP at 7</u> .....	7
<u>FFCL 3-5 CP at 461-463</u> .....	10
<u>FCCL 4 CP at 462</u> .....	5
<u>FCCL 4-5 at 462, 463</u> .....	10
<u>FFCL 5 CP at 463</u> .....	6, 10
<u>FFCL 6 CP at 464</u> .....	10, 14, 15
<u>FFCL 7 CP at 465</u> .....	10, 16

## **RECORD OF PROCEEDINGS**

<u>RP at 440</u> .....	7
<u>RP at 443</u> .....	9
<u>RP at 503</u> .....	14
<u>RP at 652</u> .....	13
<u>RP at 659</u> .....	13

## **OTHER**

Websters Law Dictionary (2006).....	5
-------------------------------------	---

## SUMMARY OF ARGUMENT

The trial court in determining custody of Angelo Cork failed to apply the appropriate standards articulated in In re Custody of Shields, 136 P.3d 117 (Wash. Jun 08, 2006) (No. 75263-0). A non-parent can file a petition seeking custody of a child under RCW 26.10.030(1) if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian. The petition must be filed in the county where the child is permanently resident or where the child is found. In re Marriage of Allen, 28 Wash.App. 637, 626 P.2d 16, Wash.App. (1981) concluded that a court may award custody of a child to a non-parent if the parent is either unfit or if placement with an otherwise fit parent would result in “actual detriment” to the child. In determining whether or not to award custody to a non-parent, the court in Allen rejected the “best interests of the child” standard (used between two competing parents) because it did not provide proper deference to a fit parent. In re Custody of RRB, 108 Wash.App. 602, 31 P.3d 1212, Wash.App.Div.2 (2001). A heightened standard must be applied when a non-parent petitions for custody over a parent and the requisite showing required is substantial. Shields at 126. In cases where a parent is fit, Shields recognized that a court can interfere only with a fit parent’s parenting decision to maintain custody of his or her child if the non-parent

demonstrates that placement of the child with the fit parent will result in **actual** detriment to the child's growth and development. Id. at 126.

**1. RESPONDENTS FAILED TO PROVIDE ANY EVIDENCE TO SUPPORT ACTUAL DETRIMENT TO THE CHILD IF PLACED IN BIOLOGICAL MOTHER'S CARE.**

Shields approved the actual detriment standard articulated in Allen.

Under this heightened standard, the court can only interfere with a fit parent's parenting decision to maintain custody of his or her child if the non-parent demonstrates that placement of the child will result in **actual** detriment to the child's growth and development. Id. at 126. The standard required in a custody case between a parent and a non-parent is a heightened legal standard; more than the best interest of the child standard. Id. at 124. The Shields court held that "while the detriment standard does not require a showing of unfitness, it does require a showing that placement with an otherwise fit parent will cause **actual** [not speculative] detriment to the child's growth and development. In re Parentage of C.A.M.A., 154 Wash.2d 52, 60-61, 109 P.3d 405, Wash. (2005) found that state interference with a fit parent's fundamental right to autonomy in child rearing decisions is subject to strict scrutiny. Interference is justified only if the state can show that it has a compelling interest and such interference is narrowly tailored to meet compelling state interest involved.

Id. When this heightened standard is properly applied, the requisite showing required by the non-parent is “substantial.” Shields at 126 (citing to In re Custody of Shields 120 Wash.App. 108, 123, 84 P.3d 905, Wash.App.Div.3 (2004)), and a non-parent will generally be able to meet this test in only “extraordinary circumstances.” (citing to Allen at 649). As such, the cases cited in Shields that have given custody to a non-parent were just that; extraordinary cases that have dealt with disabled or special needs children. Allen (child born deaf required special environment requiring signing and ability to communicate with child; father was unable or willing to provide this for the child; RRB (non-parent met burden of establishing **actual** detriment in case of suicidal child suffering from bipolar stress disorder and posttraumatic stress disorder; child required extensive therapy and stability at the level parents could not provide) (emphasis added); In re Custody of Stell, 56 Wash.App. 356, 783 P.2d 615, Wash.App. (1989) (non-parent met the burden of establishing **actual** detriment in the case of a child that had been physically and sexually abused while young; child required extensive therapy and stability at the level the parent could not provide)(emphasis added). This is not an extraordinary case. Angelo does not have special needs, is not disabled and was never abused.

There is a difference between **actual** and **speculative** detriment. Actual means “*existing in act and not merely potentially*” while speculative means, “*theoretical rather than demonstrable*”. Websters Law Dictionary (2006). The **actual** detriment test is a very focused test with the requisite showing required by the non-parent to be “substantial” and only met in the most extraordinary of circumstances. Shields at 126. In re Custody of Nunn, 103 Wash.App. 871, 14 P.3d 175, (2000), the wrong legal standard was applied and the trial court awarded custody to the non-parent when there was no evidence that the parent could not properly parent the child. Nunn at 874. Here, by applying the wrong standard, the court failed to require the non-parents provide proof of **actual** detriment. Thus, the record is void of any evidence substantiating **actual** detriment to the child in Ms. Cork’s care. In fact, the record reflects that “[i]n September 2002, things were going well.” FFCL 3 CP at 7. In December 2002 there were no negative reports from Angelo’s school, medical providers or other individuals in contact with the child. FFCL 4 CP at 462. By this point the child had been in Ms. Cork’s care and custody for eight months without the Respondents involvement. Then “[particularly] after Christmas...Angelo appeared agitated, he was aggressive and he was very angry...that behavior escalated” FFCL 4 CP at 462. Reports of this negative behavior began only after Comm. Aronow



ordered visitation for the Respondents to resume. The behavior problems causing detriment to the child were in most part the outcome of Respondents having contact again with the child and their continued interference in the child's life. The court had no justification for interfering in Ms. Cork's parenting decisions as required by C.A.M.A. at 60-61 and Shields at 126.

In its findings, the Court cited no testimony or evidence presented by Vicki Weida, David Strum, or Liz Hayden. This evidence undisputedly supported detriment to Angelo being caused by the Respondents, not placement with Ms. Cork. Moreover, there was evidence of the interference of the Respondents in not only Ms. Cork and Angelo's bonding and attachment, but evidence of how their behavior demonstrated complete disregard for Angelo's well-being. This evidence was critical to a complete understanding that the "behavioral problems" the Guardian ad Litem and Carol Thomas relied upon in recommending placement with Respondents.

The report of Carol Thomas concluded "that the [Respondents] are Angelo's psychological parents" and that she has "great concerns that continued placement with Ms. Cork would have a detrimental effect on Angelo's socio-emotional growth and that this would result in increased depression, withdrawal, rebellion self destructive behaviors, violent

behaviors towards others.” FFCL 5 CP at 463. The record reflects that neither Carol Thomas nor the Guardian Ad Litem interviewed or evaluated the relationship of the child with Ms. Cork prior to April 2003 (without the Respondents involved in their lives), nor did either of them review any previous reports of the child of the parties, nor consult with any of the child’s or the parties’ previous counselors in Montana RP at 440.

Furthermore, there is no evidence to support Ms. Thomas applying the factors mandated by In re Parentage of L.B., 121 Wash.App. 460, 89 P.3d 271 (2004) in order to consider the psychological parent theory as a basis for placement with non-parents over the natural parent.

The court cited to no **actual** detriment that would come to the child if placed in Ms. Cork’s care, only speculation on the part of Carol Thomas who never even observed the child in the care of the mother without the Respondents involvement in their lives. As a result, the trial court failed to accord Ms. Cork the benefit of the presumption that placement of Angelo with her, a fit parent, would be in Angelo’s best interest and failed to place a heightened burden of proving **actual** detriment upon the Petitioners, the non-parents.

**2. THE TRIAL COURT ERRONEOUSLY APPLIED THE “BEST INTERESTS OF THE CHILD” STANDARD INSTEAD OF THE ACTUAL DETRIMENT STANDARD.**

Non-parental Custody cases require the trial court to apply the actual detriment standard articulated in In re Marriage of Allen 28 Wash.App 637, 626 P.2d 16, (1981) and not the best interests standard as applied between two parents. The court has the responsibility of focusing on whether or not there is substantial evidence to support **actual**, not merely speculative, detriment to the child's long-term growth and development should he be placed with his mother. Shields at 129. The "totality of the circumstances" analysis is appropriate when applying the "best interests of the child" analysis in custody disputes only as between two parents(or two non-parents). Shields at 127. This case required application of the heightened **actual** detriment standard.

In Shields, the court held that the trial court failed to apply the required heighten actual detriment standard. In its review of the evidence presented, the trial court in Shields considered evidence relating to the seven factors contained in RCW 26.09.187 for determining the "best interests of the child by comparing Harwood (parent) and Shields (non-parent). Id. at 127. The court inappropriately cited such factors as the mother's employment schedule, the child's desire to live with the non-parent, and the strength of the child's relationship to the non-parent. As a result, the trial court failed to accord Harwood, the parent, the benefit of the presumption that placement of CWS with her, a fit parent, would be in

CWS's best interest and failed to place a heightened burden of proof upon Shields, the non-parent. Id. at 127.

Similarly in this case, the trial court indicated it applied a non-parental custody standard and that it had not viewed this case under a "best interests of child" standard which is used in dissolution matters. FFCL 2 CP at 460. However, the Custody Order and the record demonstrate that the trial court erroneously applied the "best interests of child" standard. Section 2.5 of the Custody order clearly indicate "BEST INTEREST OF THE CHILD/FINDINGS OF THE COURT." (emphasis added). The conclusions of law indicate the disposition to be "[i]t is in the best interests of the child to reside with David Nagel and Anita Bangert for the reasons set forth in the findings. Despite what the trial court stated in its decision, just like Shields, the record reflects that the court incorrectly followed the guidelines set forth in dissolution matters for deciding custody between two parents pursuant to RCW 26.09.100 and 26.09.187. Carol Thomas, whose report the trial court relied on heavily, admitted that she used the same comparison for Ms. Cork and the Respondents that she would between two parents. RP at 443.

The trial court's decision gave inappropriate weight to the child's alleged desire to be with the Respondents and allowed significant amount of inadmissible statements of the child, as indicated in the Findings, into

evidence despite objection from Ms. Cork (Factor vi). The court emphasized the child's relationship with the Respondents and the length of time he spent in foster care with the Respondents (Factor v) FFCL 3-5 CP at 461-463, the child's poor self image, bonding and attachment to Respondents FFCL 5 CP at 463, lack of bond and attachment to Ms. Cork FFCL 5 CP at 463, that the child was suffering from the separation and loss of the Respondents FFCL 5 CP at 463, the child was distant and detached from Ms. Cork FFCL 5 CP at 463; and Ms. Cork did not provide a stable home for the child due to the various moves she made (Factor i) FFCL 7 CP at 465, with the trial court giving the greatest weight to Carol Thomas's conclusions that Respondent's are the psychological parents to the child to which he is bonded and attached (Factor i), FFCL 4-5, 7 CP at 462-463,465 (see also RCW 26.09.187 indicating *Factor i shall be given greatest weight*)(emphasis added). The court watched Ms. Cork and it appeared her "general attitude toward the situation with regard to the child was at best casual," "Ms. Cork didn't seem to or at least didn't admit, that she saw anything wrong with regard to Angelo" (Factor iii), FFCL 6 CP at 464. The court discussed at length what Angelo talked about and how much he missed the Respondents and his feeling toward the Respondents and Ms. Cork. FFCL 4-5 CP at 462-463. The court cited extensively to Carol Thomas conversations with Angelo in particularly how the child

“not only want[ed] to, he longed to be with the [Respondents], (Factor iv)

FFCL 5 CP at 463. Thus, as in Shields, the trial court imposed on Ms.

Cork an even greater burden of proof to meet, contrary to the constitutional presumption that should have been afforded her as a fit parent. Shields at 129.

The trial court claimed to apply the “actual detriment” standard, but cited no evidence that supported **actual** detriment to the child if placed in Ms. Cork’s care. The record reflects that the court instead applied the “best interest of the child” standard by narrowing its focus to evidence that corresponds to the factors set out in RCW 26.09.0187 for custody disputes between parents. The court ordered custody in favor of the non-parent respondents, based only on a preponderance of the evidence and without the mandated constitutional deference to Ms. Cork. Under the “actual detriment” standard set forth in Allen and affirmed in Shields, the trial court should have focused primarily on the effects on Angelo’s long term growth and development should he be placed with his mother, Ms. Cork, and placed the burden squarely on the Respondents to prove such detriment. This test is not a balancing of each household, the relationship of the child to the Respondents and the wishes of Angelo; it is a focused test looking at **actual**, not speculative, detriment to the child if placed with an otherwise fit parent. Shields at 129.

**3. THE TRIAL COURT ERRONEOUSLY TRANSFERRED THE BURDEN FROM THE RESPONDENTS TO THE BIOLOGICAL MOTHER TO PROVIDE EVIDENCE WHY SHE SHOULD HAVE CUSTODY OF HER CHILD.**

In a child custody dispute between a parent and a non-parent, the non-parent has a heightened burden to establish that **actual** detriment to the child's growth and development will occur if the child is placed with the parent. Shields; RCW 26.10.030(12). Non-parental custody actions require a non-parent to bear the burden of proof that exceeds the preponderance of the evidence required under the "best interests of the child" standard utilized in disputes between parents. The non-parent is required to plead a well-founded allegation of unfitness or a showing of actual detriment to the child. Shields at 124. Here, the Respondents had that heightened burden. However, the trial court inappropriately transferred this burden to Ms. Cork by requiring her to defend her parental decision making in order to retain custody of her son.

By applying this related burden of proof, the trial court failed to afford Ms. Cork the presumption that placement with her would be in the child's best interest. Shields at 127. The court failed to afford deference to the mother, and that her care and custody of the child was not causing detriment to her son. The trial court had a duty to focus its attention on requiring Respondents to provide substantiated evidence of **actual** long

term detriment to the child's growth and development if placed with the mother. Instead the court forced Ms. Cork to prove that her decisions relating to custody of her son were not causing actual long term detriment to the child.

The trial court in large part determined that it was Ms. Cork's decision regarding counseling for her son that created a situation where it would be detrimental to place the child in her care. The trial court failed to recognize critical evidence at trial that demonstrated that any detriment was actually being caused by the Respondents' re-involvement with the child, not the lack of counseling on Ms. Cork's part. Testimony provided that it was made very clear to the Respondents "that interference with or failure to support Angelo in permanency with birth mother may be considered damaging to his general welfare..." RP at 659. Evidence showed Respondents still interfered with relationship of Ms. Cork and Angelo during the critical reunification process, and expressed anger toward [Ms. Cork] in front of Angelo. RP at 652. Ms. Cork had to provide evidence and witnesses to testify that the Respondents' behavior and expression during the reunification made her very concerned that their desire to be Angelo's parents and inability to allow Angelo to have a reasonable relationship with his mother, Ms. Cork, would interfere with his [Angelo's] ability to feel safe with his mother and to find security there



with his feelings about himself. RP at 659. Evidence supports that it was not Ms. Cork's decisions regarding her son, rather Respondents' need to be Angelo's parents that was getting in the way, (Id.) of Angelo needing to transfer his attachment to his mother, Ms. Cork. It was important the Respondents contact with Angelo be cut for at least six months to a year to allow the new bond between Ms. Cork and her son to set itself. RP at 503.

The trial court stated that Ms. Cork failed to follow recommendations of professionals involved with her son and did not take the child to any counselor other than the delayed contact with Ms. Thomas. FFCL 6 CP at 464. The trial court failed to address that Ms. Cork did in fact follow the recommendations of professionals to cut off all contact with the Respondents for six months to one full year in order to prevent detriment to the child's growth and development; the very detriment that was later caused by the Respondents re-involvement with the child during the course of the court proceedings. It was the Respondents that ignored the actual recommendation of the experts not to have contact with the child.

Evidence supports the fact that during the entire time Ms. Cork was actually following the recommendation of the experts to keep the Respondents from being involved in Angelo's life, there was no detriment to the child. It is undisputed that when Ms. Cork arrived in Spokane in

May 2002 and for almost eight months afterwards, counseling was not needed because the evidence showed that the child was happy and adjusted. The court even recognized that it was not until sometime after Christmas (when the court allowed Respondents to be involved in the child's life) that there were significant behavioral issues occurring that were causing detriment to the child.

The trial court asserted that "Ms. Cork didn't seem to, or at least didn't admit that she saw anything wrong with regard to Angelo. She didn't see any of these behavioral or emotional issues that to others were huge red flags" FFCL 6 CP at 464. Naturally she didn't see them because the entire time she was following the recommendation of the experts to keep the Respondents out of the child's life, there were no significant behavioral problems; there was no detriment to the child occurring while placed with Ms. Cork. It was not until the Respondents were allowed by the court once again to be involved in the child's life that the behavioral problems began. Ms. Cork was not afforded her constitutional presumption that placement with her, a fit parent, was in Angelo's best interest; she was forced to prove that it was not placement with her that was causing the detriment, but placement with the Respondents that was the actual cause of long term detriment to the child's mental and emotional well-being.

**4. FACTORS IN IN RE PARENTAGE OF L.B. WERE NOT MET, THEREFORE THE COURT CANNOT RELY ON EVIDENCE OF PSYCHOLOGICAL PARENT.**

The only standard to be used in transferring custody from an otherwise fit parent to a non-parent is a showing of **actual** detriment to the child if placed with the natural parent. The court should not have used evidence of a psychological relationship as a basis to transfer placement in this case. In order for a court to even recognize de facto, psychological or other such parental relationship, four criteria must be met before any deference to such a relationship will be entertained. Shields at 127; L.B.; approving the actual detriment standard articulated in Allen, the Shields court stated its concern over references to the concept of “*de facto family*,” “*psychological parent*” and “*in loco parentis*.” (emphasis added) Id. at 127. Incautious use of such terms as psychological parent leads to great confusion. L.B. at 691-92. Here, the trial court based its decision on placement of the child primarily on the conclusion of Carol Thomas that the “[Respondents] are psychological parents to Angelo” and “continued placement with the mother would detrimentally affect Angelo’s growth and development.” FFCL 7 CP at 465.

The L.B. court as well as the Shields court were cognizant of the importance of a psychological bond between a child and a non-parent. However, the court balanced the constitutional rights of the natural parent

to the care and custody of their child with that of a person having a psychological bond with the child by ensuring that these four critical factors were first met. The threshold factor requires *the legal parents' consent and support of the relationship between the psychological parent and the child* (emphasis added) *Id.* at 708. By making this factor a threshold requirement, recognition of the relationship (such as that of the Respondents and Angelo) does not intrude on the legal parents basic liberty interests in raising a child as he or she sees fit. V.C. v. M.J.B., 163 N.J. 200, 748 A.2d 539 (2000). Accordingly, any evidence supporting a claim of actual detriment to Angelo's growth and development based on his denial of that relationship cannot even be considered if Ms. Cork did not consent to earlier placement with the Respondents. Ms. Cork's Brief on Appeal, outlined and discussed the L.B. courts four factors which were not met by the Respondents. Of these factors, the most notable, which has been present in L.B. and nearly all the cases prior to L.B. that have transferred placement from an otherwise fit parent to a non-parent, is the biological parent's consent to and fostering of the relationship between the child and non-parent. The required "consent to and fostering of the relationship" is not present here. As outlined in the Brief on Appeal, all evidence contradicts any "consent to or fostering of" on Ms. Cork's part to such a relationship. This case is unusual because the only basis for the

relationship/bond between Respondents and Angelo Cork is based on the unconstitutional conduct of the State of Montana, not any voluntary conduct of the child's mother, Holly Cork.

The court relied almost exclusively on the testimony of Carol Thomas which based much of her opinion on the psychological parent relationship the Respondents have with the child. The court cannot even consider this testimony if the threshold consent factor of L.B. has not been met.

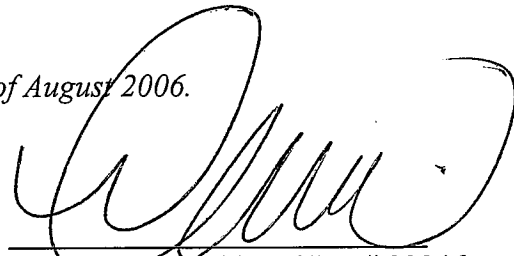
The trial court's recognition of the Respondents as the psychological parents and adoption of Carol Thomas' recommendations based on that relationship impermissibly interferes with Ms. Cork's constitutionally protected right to the care and custody of her child and the deference to be afforded to her. Id. at 127.

### CONCLUSION

The trial court in this case applied the wrong legal standards in determining custody of Angelo Cork. Under RCW 26.10, non-parental custody actions require application of the heightened **actual** detriment standard, not the totality of the circumstance/best interest of the child standard as used by the trial court. Furthermore, the court inappropriately used the "psychological parent" theory without meeting the factors mandated by L.B. for transferring custody from a parent to a non-parent.

In applying the incorrect standards, the court erroneously transferred the burden of proof from the Respondents to Ms. Cork, thus ignoring the appropriate deference that was to be afforded her as a fit parent.

*Respectfully submitted this 16<sup>th</sup> day of August 2006.*

A handwritten signature in black ink, appearing to read 'Andrea Poplawski', written over a horizontal line.

Andrea Poplawski, WSBA # 32246  
Attorneys for Holly Cork, Appellant

**Certificate of Service**

The undersigned certifies under the penalty of perjury according to  
the laws of the United States and the State of Washington that on this date

I caused to be served in the manner noted below a copy of this document  
entitled **Appellant's Supplemental Brief** on the following:

**Clerk of Court  
Court of Appeals of the State of Washington  
Division III  
500 N. Cedar Street  
Spokane, WA 99201**

☐ Via Messenger  
☒ Via Mail  
☐ Via Facsimile

**David J. Crouse  
W. 422 Riverside, Suite 518  
Spokane, WA 99201**

☐ Via Messenger  
☒ Via Mail  
☐ Via Facsimile

DATED this 17th day of August 2006.



Mary E. Harvill

N:\Attorney Folders\Andrea\Andrea Clients\Cork, Holly\APPEAL\supplemental brief  
final.doc